In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

No. 76-1770

INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS, AFL-CIO, LOCAL 433,
Petitioner,

VS.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

VAN BOURG, ALLEN, WEINBERG & ROGER,
VICTOR J. VAN BOURG,
DAVID A. ROSENFELD,
45 Polk Street,
San Francisco, California 94102,
Telephone: (415) 864-4000,
Attorneys for Petitioners.

PERNAU-WALSH PRINTING CO. - 562 MISSION STREET - SAN FRANCISCO, CA 94105

Subject Index

Table of Authorities Cited

Regulations

Statutes

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

No.

INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS, AFL-CIO, LOCAL 433,
Petitioner,

VS.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO, Local 433, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

OPINIONS AND ORDERS BELOW

The opinion of the Court of Appeals is reported at 549 F. 2d 634 and appears as Appendix A. This

opinion enforced a "Decision and Order" of the National Labor Relations Board which is reported at 218 N.L.R.B. 848 (1975) and appears as Appendix B. This "Decision and Order" followed a "Decision and Determination of Dispute" which is reported at 214 N.L.R.B. 912 (1974) and appears as Appendix C.

JURISDICTION

The opinion of the court was filed on January 17, 1977. A timely petition for rehearing was denied on February 23, 1977. The judgment of the court was entered on March 14, 1977. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

May the National Labor Relations Board rely upon the proceedings held in a jurisdictional disputes hearing under 29 U.S.C. § 160(k) for a finding of the commission of the elements of an unfair labor practice under 29 U.S.C. § 158(b)(4)(D) without violating the Administrative Procedure Act?

STATUTES INVOLVED

29 U.S.C. § 160(k) provides:

> Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 158(b)

> of this title, the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

29 U.S.C. § 158(b)(4)(D) provides:

> It shall be an unfair labor practice for a labor organization or its agents—
>
> to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—
>
> forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless

such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

STATEMENT OF THE CASE

This matter arose out of a jurisdictional dispute between petitioner, Iron Workers Local 433, and another labor organization, Glaziers & Glass Workers Union, Local 636, with respect to the fabricating and installation of metal framing pieces and glass panes in the construction of window-wall units on certain construction projects in Orange County, California.

A charge was filed by Plaza Glass Co., the subcontractor, for the window-wall units, with the National Labor Relations Board on March 14, 1974, alleging that Local 433 had violated 29 U.S.C. § 158 (b)(4)(D). After brief investigation, the Regional Director of Region 31 of the National Labor Relations Board determined that there was reasonable cause to believe that a jurisdictional dispute existed between Local 433 and Local 636. Pursuant to the statutory scheme, a hearing was noticed under 29 U.S.C. § 160(k) for the purpose of determining to which union the work in question would be assigned.

The hearing envisioned under § 160(k) was held on various days in the middle of 1974, and was presided over by a hearing officer appointed by the National Labor Relations Board from Region 31 in Los Angeles. 29 C.F.R. § 102.90.

At the hearing, Local 433 filed a motion to dismiss on the ground that the dispute in question had been resolved through "an agreed upon method for the voluntary adjustment of the dispute." 29 U.S.C. § 160(k). In essence, Local 433 asserted that all of the parties to the dispute had agreed to permit this dispute to be resolved by the Impartial Jurisdictional Disputes Board of the Construction Industry established by the Building & Construction Trades Council of the AFL-CIO. Local 433's defense was premised upon the fact that this Board had previously awarded the particular work in dispute to the Iron Workers, and not to the Glaziers, represented by Local 636.

The hearing officer rejected the defense, denied the motion to dismiss, and proceeded with the merits of the hearing as to whether the work in question should be awarded to the Iron Workers or the Glaziers.

The hearing was conducted, not by an Administrative Law Judge, but rather, by a hearing officer, and was merely an *investigative* proceeding. 29 C.F.R. § 101.34. The hearing was not conducted by either the rules of evidence or the Administrative Procedure Act. 5 U.S.C. § 500 *et seq.* The parties, the various employers and the unions involved, were permitted to "make a record," which was closed by the hearing officer, and the transcript and exhibits were then forwarded to the National Labor Relations Board in

Washington for review and decision. The hearing officer made no recommendations, nor any credibility findings.

After transferal of the record to the Board, it "determined" the dispute in question and awarded the window-wall work not to the Iron Workers, but rather, to the Glaziers, contrary to the previous decision of the Impartial Jurisdictional Disputes Board. See "Decision and Determination of Dispute", *Glaziers, Glass Workers, etc., Local 636 and Plaza Glass Co. and International Association of Bridge, Structural & Ornamental Iron Workers, Local 433,* 214 N.L.R.B. 912 (1974).

Local 433 did not acquiesce in the decision of the Board that the window-wall work should be awarded to the Glaziers. For that reason, an unfair labor practice complaint was issued alleging that Local 433 had violated and was continuing to violate 29 U.S.C. § 158(b)(4)(D) by threatening picketing in support of a jurisdictional dispute. 29 C.F.R. § 102.91. Without a formal hearing as to the issues raised, the Board granted a motion by its General Counsel for summary judgment. The Board's subsequent decision finding Local 433 to have violated the National Labor Relations Act was based *solely* upon the motion for summary judgment, and not upon any evidence taken before an Administrative Law Judge under the strictures of the Administrative Procedure Act. Indeed, the subsequent decision of the National Labor Relations Board finding a violation of the federal law was based upon the application of *res judicata* to the

"Decision and Determination of Dispute" which arose out of the proceedings under § 10(k) of the National Labor Relations Act.

The question which is presented to this Court is whether the National Labor Relations Board, in proceedings under § 8(b)(4)(D) of the Act, can rely upon the finding from proceedings held under § 10(k) of the Act, that no voluntary agreed upon method for resolution of the dispute existed when the proceedings under § 10(k) of the Act were purely investigatory, and not governed by the due process requirements of the Administrative Procedure Act.

REASONS WHY THIS WRIT SHOULD BE GRANTED

This case involves an issue which is fundamental to the administration of the National Labor Relations Act and the resolution of jurisdictional disputes.

The fundamental defense raised by the Iron Workers was that all parties—the Iron Workers, the Glaziers, and the employers involved—had agreed upon a voluntary method of resolution of the jurisdictional dispute through the Impartial Jurisdictional Disputes Board of the Construction Industry, which had previously awarded the work in question to the Iron Workers. Local 433 was deprived of the right to an adjudication of the merits of its defense in the proceedings brought under § 8(b)(4)(D).

The Board's "Decision and Determination of Dispute" found that no voluntary method of dispute resolution existed.[1] 214 N.L.R.B. at 914. Relying upon this "Decision", the Board subsequently found that no voluntary method of dispute resolution existed by the following process:

> "Review of the record in the 10(k) proceeding indicates that these issues [with respect to the dispute resolution] were raised and litigated therein. As noted above, Respondent [Local 433] appeared in that proceeding and was provided with a full opportunity to litigate these issues. It offers no evidence herein that was not presented in that proceeding. It is settled that issues raised and litigated in a 10(k) proceeding may not be relitigated in a subsequent unfair labor practice proceeding, alleging violations of Section 8(b)(4)(D) which are based in part on factual determination made in a 10(k) proceeding. Furthermore, it is established that a hearing *de novo* is not required in the unfair labor practice case on issues litigated in a previous 10(k) proceeding, especially where as here respondent offers nothing not previously considered therein." 218 N.L.R.B. at 849. (fn. omitted).

It is apparent that the Board's decision in the unfair labor practice case was based upon an application of the doctrine of *res judicata,* on the ground that the

[1]The general contractor and the two unions involved were bound to the Impartial Jurisdictional Disputes Board. The substantive issue was whether Plaza Glass, the subcontractor, was also so bound.

factual issues had been "litigated" in the § 10(k) proceeding, and could therefore not be properly "relitigated."

The procedure utilized by the Board violates the Administrative Procedure Act and this Court's interpretation of Section 10(k) of the Act in *International Telephone & Telegraph Corp. v. Local 1134, I.B.E.W.,* 419 U.S. 428 (1975); and *National Labor Relations Bd. v. Plasterers' Local Union No. 79,* 404 U.S. 116 (1971). In the *Plasterers'* case, this Court stated with respect to the § 10(k) proceeding:

> "The §10(k) determination is not binding as such even on the striking union. If that union continues to picket despite an adverse §10(k) decision, the Board must prove the union guilty of a §8(b)(4)(D) violation before a cease-and-desist order can issue. The findings and conclusions in a §10(k) proceeding are not res judicata on the unfair labor practice issue in the later §8(b)(4)(D) determination. International Typographical Union, 125 N.L.R.B. 759, 761 (1959). Both parties may put in new evidence at the §8(b)(4)(D) stage, although often, as in the present cases, the parties agree to stipulate the record of the §10(k) hearing as a basis for the Board's determination of the unfair labor practice. Finally, to exercise its powers under §10(k), the Board need only find that there is reasonable cause to believe that a §8(b)(4)(D) violation has occurred, while in the §8(b)(4)(D) proceeding itself the Board must find by a preponderance of the evidence that the picketing union has violated §8(b)(4)(D). International Typographical Union, supra, at 761 n.5 (1959)." 404 U.S. at 122, n. 10.

It is clear that the § 10(k) "Decision and Determination" constitutes nothing more than "evidence"[2] to be utilized along with other evidence in the proceedings alleging the actual commisison of the unfair labor practice under § 8(b)(4)(D).

This is consistent with this Court's decision in the *I.B.E.W.* case, wherein this Court held that it was not improper for a National Labor Relations Board attorney to act both as the hearing officer in the § 10(k) proceeding and as Counsel for the General Counsel in the § 8(b)(4)(D) proceeding, based upon the principle that the § 10(k) proceeding "need not be conducted pursuant to Section 5 of the Administrative Procedure Act . . ." 419 U.S. at 448.

The two fundamental reasons why the "Decision and Determination" under § 10(k) may not act as *res judicata* in the § 8(b)(4)(D) proceeding are absolutely clear. First, the Board's "Decision and Determination" in the § 10(k) hearing is based upon a "reasonable cause" standard, while the burden of proof in the § 8(b)(4)(D) proceeding is a preponderance of the evidence standard. See *International Typographical Union,* 125 N.L.R.B. 759, 761, n.5 (1959). Without the same standard of proof, the proceedings in one hearing may not constitute *res judicata* in the second.

Secondly, the § 10(k) "Decision and Determination" is not based upon an adjudication within the meaning of the Administrative Procedure Act. *International*

[2]The Board's rules do not permit application of *res judicata.* Rather, the 10(k) record "become[s] a part of the record in [the] unfair labor practice proceeding . . ." 29 C.F.R. 102.92.

Telephone and Telegraph Corporation v. Local 134 I.B.E.W., supra, 419 U.S. at 446-448. Since the "Decision and Determination" is not an adjudication, it cannot be the basis for an assertion of *res judicata. United States v. Utah Construction & Mining Co.,* 384 U.S. 294, 421-22 (1966).

In enforcing the decision of the Board, the Court of Appeals rejected petitioner's argument on the ground that the Board did not apply a principle of collateral estoppel, but rather, "reexamined the record and made independent findings with regard to the commission of unfair labor practices by Respondent." App. 8. That is, the Court of Appeals asserted that the Board could reexamine the cold record made in the § 10(k) investigation in considering the facts upon which the motion for summary judgment was made in the § 8(b)(4)(D) proceeding. The fallacy of such a procedure is self-evident: the record gathered in the § 10(k) proceeding was not litigation and was merely an investigatory proceeding. It is not governed by the Administrative Procedure Act. 29 C.F.R. § 101.34.[3] For example, the Board could not make

[3]Under Board rules, the 10(k) hearing is governed by the rules applicable to representation matters. 29 C.F.R. §102.90. The rules of evidence are not controlling, 29 C.F.R. §102.66, and the hearing officer may be substituted at anytime. 29 C.F.R. §102.64. The hearing is nonadversary in nature "and the primary interest of the hearing officer is to insure that the record contains a full statement of the pertinent facts as may be necessary for a determination of the issues by the Board." 29 C.F.R. §101.34. There is a distinct difference between this type of investigatory hearing and those hearings conducted under the authority of 29 U.S.C. §160(c) in which a party is charged with the commission of an unfair labor practice. These hearings are strictly governed by the Administrative Procedure Act. 29 C.F.R. §102.34-102.45.

findings of credibility based upon the cold record of the § 10(k) proceeding where such credibility findings are necessarily made by the Administrative Law Judge who hears the testimony and observes the witnesses in the unfair labor practice proceeding. This procedure plainly circumvents the hearing process mandated by the Administrative Procedure Act.

There is, therefore, a fundamental procedural question herein, and that is whether the Board can properly review the stenographic record made in the investigatory hearing and use that record as the basis for an independent finding of the commission of an unfair labor practice, without the hearing required by § 10(c) of the National Labor Relations Act and § 5 of the Administrative Procedure Act.[4] Petitioner was denied the fundamental right to have the issue of the existence of a voluntary method for the resolution of disputes litigated under the due process requirements of the Administrative Procedure Act.

---

[4]The Court of Appeals for the District of Columbia Circuit has made the same error in *Bricklayers, Masons & Plasterers Int'l Union of Am v. N.L.R.B.*, 475 F.2d 1316 (D.C. Cir. 1973). In that case, the court concluded that a union could not litigate matters in the 8(b)(4)(D) proceeding which had been considered in the 10(k) proceeding, because that "would not have been consistent with the plan of the statute." *Id.* at 1322. This decision is plainly inconsistent with this Court's interpretation of the relationship between the 10(k) proceeding and the 8(b)(4)(D) proceeding in *N.L.R.B. v. Plasterers Union, supra.* The plan of the National Labor Relations Act, although envisioning a rapid determination under the 10 (k) hearing, did not envision a denial of the rights of the Administrative Procedure Act in finding that the union persists in its violation of Section 8(b)(4)(D).

CONCLUSION

The fundamental issue raised by this petition is one of due process, as guaranteed by the Administrative Procedure Act. The Board's process in this case has violated this Court's previous mandate in § 10(k) proceedings and the requirements of the Administrative Procedure Act.

For all the above reasons, this Petition for Writ of Certiorari should be granted.

Dated, San Francisco, California,
June 9, 1977.

VICTOR J. VAN BOURG,
DAVID A. ROSENFELD,
VAN BOURG, ALLEN, WEINBERG & ROGER,
Attorneys for Petitioners.

(Appendices Follow)

APPENDICES

Appendix A

United States Court of Appeals
for the Ninth Circuit

No. 75-3261

National Labor Relations Board,
Petitioner,

vs.

International Association of Bridge, Structural and Ornamental Ironworkers, AFL-CIO, Local 433,
Respondent.

On Application for Enforcement of an Order
of the National Labor Relations Board

OPINION

Before: DUNIWAY, CARTER, and CHOY, Circuit Judges.

CARTER, Circuit Judge:

This case is before the court on application of the National Labor Relations Board for enforcement of an order issued June 25, 1975, against the International Association of Bridge, Structural and Ornamental Ironworkers, AFL-CIO, Local 433 (Respondent). We enforce the order.

Facts

In 1973, Plaza Glass Company was hired to fabricate and install doors and windows in an apartment project in Marina del Rey, California. For the job, Plaza Glass used its own employees, who were members of the Glaziers, Glassworkers and Glass Warehouse Workers Union, Local 636 (Glaziers). Plaza Glass is a party to a collective bargaining agreement with the Glaziers by virtue of its membership in the Southern California Glass Management Association.

In January 1974, a representative of Respondent complained to Plaza Glass that the work being done should go to its members. Several threats were made against Plaza Glass by representatives of Respondent to slow down or stop the project unless its members were hired. The Glaziers took the position that reassignment of the work would be violative of the contract it had with Plaza Glass and might be grounds for picketing the job site.

Plaza Glass filed unfair labor practice charges against both unions. Believing that a jurisdictional dispute existed between the two unions, the Regional Director of the NLRB ordered a hearing to be held, pursuant to § 10(k) of the N.L.R.A.[1] The hearing was conducted in May, June and July 1974. The sole issue advanced by the Respondent at the § 10(k) proceeding was whether the Board lacked jurisdiction be-

[1]Section 10(k) (29 U.S.C. § 160(k)) provides:

"Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 158(b) of this title, the Board is empowered and directed to hear and determine the dispute out

cause the parties had voluntarily agreed to be bound by the decision of the Impartial Jurisdictional Dispute Board (the "Dispute Board"). A decision was issued by that Board on November 12, 1974. The Board found that there was reasonable cause to believe that both unions had violated § 8(b)(4)(D) of the N.L.R.A.,[2] and that all of the parties involved had not agreed upon a method of voluntarily settling the dispute.

The Board awarded the work to the Glaziers. Respondent was given 10 days in which to notify the Regional Director of its compliance with the § 10(k) decision. Respondent did not answer, and a Board complaint charging unfair labor practices followed.

After Respondent filed its answer to this complaint, General Counsel for the Board filed a motion to strike the denials in the answer, together with a mo-

of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed."

[2]Section 8(b)(4)(D) (29 U.S.C. § 158(b)(4)(D)), in relevant part, makes it an unfair labor practice for a labor organization or its agents "to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where . . . an object thereof is —

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work: . . ."

tion for summary judgment. The Board granted the motion, finding that all the issues raised by Respondent's denials were resolved either in the § 10(k) proceeding or by the General Counsel's evidence in support of his motions. Respondent had not presented any new evidence of its own.

Prior to the § 10(k) hearing, the two unions attempted to resolve their jurisdictional dispute by means of arbitration. In March 1974, the Dispute Board awarded the work to Respondent, on the basis of trade practice. In its § 10(k) deliberations, the Board found that Plaza Glass had not agreed to the settlement procedure used by the unions, that Plaza Glass was not bound by the decision of the Dispute Board, and that the NLRB therefore had jurisdiction over the dispute.

Reliance on § 10(k) Proceedings

Respondent objects to the use of findings from the § 10(k) proceeding as a basis for the Board's finding of an unfair labor practice under § 8(b)(4)(D). It argues that § 554 of the Administrative Procedure Act (APA) was violated because no hearing was held before an Administrative Law Judge prior to the Board's finding. Section 554 requires an "opportunity for an agency hearing" in all cases involving an "adjudication" by the agency. Rather than for the Board to rely on its prior § 10(k) proceeding, Respondent wants a formal hearing under the APA to decide all matters pertaining to the unfair labor practice charged.

In *International Telephone & Telegraph Corp. v. Local 134, International Brotherhood of Electrical Workers, AFL-CIO,* 419 U.S. 428 (1975), the Supreme Court held that the APA does not apply to § 10(k) proceedings. However, findings made in such a proceeding can be relied upon as *evidence* that an unfair labor practice has occurred, even in a proceeding governed by the APA. There is no rule requiring that the APA govern the gathering of all evidence, nor could there be.

In *Bricklayers, Masons & Plasterers International Union of America v. NLRB,* 475 F.2d 1316 (D.C. Cir. 1973), the D.C. Circuit was faced with a case very similar to this one. That court ruled against the union complaining of the fact that summary judgment had cut off its opportunity for a hearing. The court said:

> "When, as at present, the section 10(k) determination does not end the matter and an unfair labor practice complaint issues, the proceedings become adjudicatory. Should a factual issue be involved as to the unfair labor practice, the usual intermediate decision of the Trial Examiner would be required under the A.P.A., section 554(c)(2). Here, however, the prohibited conduct constituting the unfair labor practice was not denied. The only factual dispute was whether there had been an agreed method of settlement. This had been resolved by the Board in the section 10(k) proceedings. To relitigate it, as the Unions sought, would not have been consistent with the plan of the statute. Nor does that plan require the Board, after the unfair labor practice complaint has issued, to require the evidence

> upon which it has rendered its section 10(k) decision to be reconsidered by a Trial Examiner who would then recommend a decision." *Id.* at 1322.

We find this reasoning persuasive here. When no new evidence on an issue is presented, reliance on the findings on that issue in the § 10(k) proceeding is proper.

The Fifth Circuit has reached a similar conclusion. In *NLRB v. International Longshoremen's Ass'n, Local 1576,* 409 F.2d 709 (5 Cir. 1969), the trial examiner at the § 8(b)(4)(D) hearing relied entirely on the record from the § 10(k) hearing, since no new evidence was introduced. Indeed, the trial examiner felt bound to follow the Board's § 10(k) decision as controlling. The Board then adopted the examiner's findings and conclusions. The court of appeals enforced the Board's order and rejected the union's contention that the APA had been violated by the fact that the trial examiner felt bound by the prior § 10(k) findings. The court found the case analogous to those in the representation context, in which it is well-settled that "the Board is not required to relitigate a representation issue in an unfair practice proceeding absent additional evidence which is not merely cumulative. *Pittsburgh Plate Glass Co. v. NLRB,* 1941, 313 U.S. 146, 158, 161-162 . . . ." 409 F.2d at 710. *See also NLRB v. W. S. Hatch Co.,* 474 F.2d 558, 562 (9 Cir. 1973).

Respondent suggests that *Bricklayers, supra,* was wrongly decided, and that the NLRB should not be

able to escape the requirements of the APA by basing its finding of an unfair labor practice on the record of the § 10(k) proceeding. However, the trend of modern cases favors not relitigating matters already resolved in a prior setting. As this court said in 1971:

> "It is settled law that when no fact question is involved or the facts are agreed, a plenary, adversary administrative proceeding involving evidence, cross-examination of witnesses, etc., is not obligatory—even though a pertinent statute prescribes a hearing. In such situations, the rationale is that Congress does not intend administrative agencies to perform meaningless tasks" (citations omitted).

United States v. Consolidated Mines & Smelting Co., Ltd., 455 F.2d 432, 453 (9 Cir. 1971). *See also NLRB v. Mar Salle, Inc.,* 425 F.2d 566, 571-73 (D.C. Cir. 1970). Accordingly, we hold that the findings of a § 10(k) proceeding may be used as evidence in a subsequent hearing, subject to refutation. When these findings are not contradicted, as in the case at bar, they may be the sole basis for a subsequent finding.

Respondent also argues that the different standard of proof in the § 10(k) proceeding prevents use of its findings. At the § 10(k) proceeding the Board "need only find that there is reasonable cause to believe that a § 8(b)(4)(D) violation has occurred"; in the § 8(b)(4)(D) violation hearing, the standard is "a preponderance of the evidence." *NLRB v. Plasterers' Union,* 404 U.S. 116, 122, n.10 (1971).

But here the Board did not simply rely on its previous adjudication at the § 10(k) stage, but rather

re-examined the record and made independent findings with regard to the commission of unfair labor practices by Respondent. The same evidence was used to resolve the jurisdictional dispute at the § 10(k) hearing and to support the Board's finding of a violation of § 8(b)(4)(D). However, it is apparent from the language of the Board's decision and order that the Board's prior findings were not the sole basis for the subsequent decision. In its decision, the Board stated:

> "This undisputed evidence, which as noted above is neither supplemented nor controverted in this proceeding, likewise establishes, and we find, that Respondent had engaged in conduct with an object proscribed by § 8(b)(4)(D) of the Act, in violation thereof." (T.R. at 132).

So while the evidence presented at the § 10(k) proceeding was the sole basis for the Board's subsequent decision regarding the unfair labor practice, it seems clear that the preponderence standard was applied and met. Under these circumstances, we believe that reliance upon the findings of fact from a § 10(k) proceeding as evidence to support a later finding of a § 8(b)(4)(D) violation is proper.

Summary Judgment

Respondent argues that summary judgment should not have been granted because factual issues remained undecided. This contention actually goes to the propriety of granting the motion to strike Respondent's answers, since, once these were removed, no factual issues remained. So if no factual issues were raised by

Respondent's answer, summary judgment was properly granted.

In its answer, Respondent put in issue, *inter alia,* whether a subcontracting agreement existed between Plaza Glass and the main contractor, whether Plaza Glass was an employer covered by the N.L.R.A., and whether any Ironworker representatives had threatened Plaza Glass. However, in its opposition to the motion for summary judgment, Respondent simply argued that a hearing was necessary because the issues involved could not be raised in a court or in a § 10(k) hearing. Respondent presented no affidavits or other evidence in support of its opposition to the summary judgment motion, nor did it indicate that there existed any new evidence to controvert the evidence presented at the § 10(k) hearing. As a result, the Board had only the record of the § 10(k) proceeding, and the evidence offered by its General Counsel in support of his motions, to use in considering the disposition of those motions.

An independent review of the record in the § 10(k) proceeding leads to the inescapable conclusion that all issues relevant to the unfair labor practice issue were resolved by the evidence presented at that proceeding or by the evidence presented in support of the motion for summary judgment. Respondent denied having failed to notify the Regional Director of any intention to comply with the § 10(k) order, but presented no affidavits or other evidence to counter that submitted to the Board by its General Counsel. The Board could reasonably infer from this failure to

notify the Regional Director that the union was still demanding the work in violation of § 8(b)(4)(D). Since no evidence was presented by respondent either in the § 10(k) proceeding or in the hearing on the motions, summary judgment was proper.

The language of § 10(k) also supports this conclusion. The last sentence of that section provides that "[u]pon compliance by the parties to the dispute with the decision of the Board . . . such charge shall be dismissed." 29 U.S.C. § 160(k). The implication, then, is that if there is no compliance, the charge is not dismissed. In order to comply, a party is required to notify the Board of its intent to comply. Respondent did not do so. Therefore, the Board was justified in acting on the prior charge.

Public policy clearly favors the granting of summary judgment here, where no relevant factual issues exist. As pointed out by the D.C. Circuit, it would not be "consistent with the plan of the statute" for Respondent to relitigate issues that had previously been resolved. *See Bricklayers, supra,* at 1322. In a case involving representation issues, the same court discussed at length the use of summary judgment when all factual issues had been resolved in a prior hearing:

> "While it would not be proper for the Board to grant summary judgment in a case wherein the respondent had not had ample opportunity to litigate fully all relevant issues, it would be irresponsible for the Board to waste costly administrative time needlessly when all of the factual issues have previously been resolved. Occasionally the Board may make a mistake in its determination that all the issues are clearly drawn, as it has done in the cases cited by respondent. When that occurs, the reviewing court will recognize this fact immediately and send the case back for an evidentiary hearing. Thus the interests of due process are protected through the vehicle of judicial review" (footnotes omitted).

NRLB v. Mar Salle, Inc., supra, at 573. *See also NLRB v. W. S. Hatch Co.,* 474 F.2d 558, 562 (9 Cir. 1973). Thus, the use of summary judgment as proper, and should not be disturbed by this court.

Arbitration Agreement

Respondent lastly contests the Board's finding that Plaza Glass was not bound by the findings of the Dispute Board. Plaza Glass formerly had entered into an agreement to submit matters to the National Joint Board for the Settlement of Jurisdictional Disputes. This board was dissolved in 1973 and replaced with the Dispute Board, which awarded the work to Respondent. The NLRB found that Plaza Glass had not agreed to be bound by a decision of the Dispute Board.

The NLRB's findings of fact will be upheld if supported by "substantial evidence" and its legal conclusions affirmed unless "arbitrary and capricious." *NLRB v. International Longshoreman's & Warehousemen's Union, Local 50,* 504 F.2d 1209, 1214 (9 Cir. 1974), *cert denied,* 420 U.S. 973 (1975). The Board found that Plaza Glass was not bound by virtue of its subcontracting agreement because that

agreement referred to the "National Disputes Board," which went out of existence on May 31, 1973. The Board further found that Plaza Glass had not expressly consented to be bound by the decision of the Dispute Board and had not participated in the submission of the dispute to that body.

The Board concluded on the basis of its prior decision in *Bricklayers, Masons and Plasterers' International Union, Local No. 1 (Lembke Construction Co.),* 194 N.L.R.B. 649, 650-51 (1971) that Plaza Glass' obligation to be bound by the National Board terminated when the Dispute Board replaced the National Board. The Board's reasoning in *Lembke* with regard to the replacement of one "National Joint Board" with a new "National Joint Board" seems equally compelling here:

> "The Board has consistently interpreted Section 10(k) to mean that the employer making the work assignment, as well as the rival unions claiming the work, comprise the 'parties to such dispute,' and that all must approve and enter into a voluntary adjustment procedure in order to preclude a hearing and determination pursuant to that section. In the instant case, the parties' contractual commitment to comply with National Joint Board determinations clearly had reference to a specific existing National Joint Board. There is no evidence to suggest that the parties intended by their 1969 contracts to be bound by any other than the then existing National Joint Board.
>
> "Nor is there any principle of contract law by which the parties automatically became bound

> to the new National Joint Board, as if by operation of law, when that entity came into being during the parties' contract term. Although the new entity was designated by the same name, 'National Joint Board,' it is clear that neither the Employer nor ABC had in mind any body not then in existence when they agreed to be bound by decisions of the existing 'National Joint Board.' The mere fact, therefore, that a new 'National Joint Board' was created cannot establish that the Employer was bound by its decisions. To hold otherwise would be to find that, as far as the Employer's contractual obligations are concerned, no legal distinction exists between the original National Joint Board and the reconstituted National Joint Board and that National Joint Boards are, in effect, interchangeable. Accordingly, when the original National Joint Board expired on September 30, 1969, the parties' contractual obligation thereto also lapsed" (footnotes omitted). *Id.* at 651.

See also Restatement of Contracts §§ 461, 463 (1932). Moreover, the procedures followed by the two boards are different, and Respondent's view would force Plaza Glass to accept an entirely different arbitration mechanism than the one it agreed to.

Respondent also argues that Plaza Glass participated in the proceedings before the Dispute Board by supplying the Glaziers with supportive material, including blueprints, and that Plaza Glass should therefore be bound. However, Plaza Glass was neither present nor represented in the proceedings, it made no submission of evidence or arguments, and it did

not expressly consent to the jurisdiction of the Dispute Board. Plaza Glass simply complied with a request for materials from the union that represented its employees. There was no indication that this cooperation was intended as a commitment to be bound by the Dispute Board's decision. Therefore, the Board's decision that Plaza Glass was not so bound is supported by more than substantial evidence.

Conclusion

The order of NLRB is enforced.

Appendix B

International Association of Bridge, Structural and Ornamental Ironworkers, AFL-CIO, Local 433 and Plaza Glass Company and Glaziers, Glassworkers and Glass Warehouse Workers Union, Local No. 636, affiliated with the International Brotherhood of Painters and Allied Trades, AFL-CIO. CASE 31—CD—129

June 25, 1975

DECISION AND ORDER

BY MEMBERS JENKINS, KENNEDY, AND PENELLO

Upon a charge and first amended charge filed March 14, 1974, and January 21, 1975, respectively, by Plaza Glass Company, hereafter Employer, and duly served on the International Association of Bridge, Structural and Ornamental Ironworkers, AFL-CIO, Local 433, hereafter Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 31, issued a complaint and notice of hearing on January 23, 1975, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Sections 8(b)(4)(ii)(D) and 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of hearing were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that during January, February, and March 1974, Respondent violated Section 8(b)(4)(ii)(D) of the Act by warning and threatening the Employer that it would, *inter alia,*

shut down a job on which the Employer was a subcontractor if employees represented by it were not placed on the job, with an object of forcing or requiring the Employer to assign the work of fabricating metal doors, metal framing pieces, and glass panes in the construction of window wall units, to employees represented by it rather than to employees represented by the Glaziers, Glassworkers and Glass Warehouse Workers Union, Local 636, affiliated with the International Brotherhood of Painters and Allied Trades, AFL-CIO, hereafter the Glaziers. The complaint further alleges that Respondent has failed and refused to abide by the Board's November 12, 1974, Decision and Determination of Dispute,[1] which awarded the disputed work to the employees represented by the Glaziers, by continuing to demand the disputed work and by failing and refusing to notify the Regional Director, in writing within 10 days, whether or not it would comply with the award, as required thereby. On February 13, 1975, Respondent filed an answer to the complaint, admitting in part and denying in part the allegations of the complaint, and denying the commission of any unfair labor practices.

On March 26, 1975, the General Counsel, by counsel, filed with the Board motions for summary judgment and to strike Respondent's answer. He asserts, in substance, that Respondent is not entitled to a trial *de novo* on issues which were raised and litigated in

[1] *Glaziers, Glassworkers and Glass Warehouse Workers Union, Local No. 636, affiliated with the International Brotherhood of Painters and Allied Trades, AFL-CIO (Plaza Glass Company)*, 214 NLRB No. 140 (1974).

the underlying 10(k) proceeding, and that, with the exception of Respondent's failure and refusal to give the Regional Director the requisite timely written notice, all issues raised by Respondent's answer were litigated in the 10(k) proceeding. On April 10, 1975, the Board issued an order transferring the proceedings before it and a notice to show cause why the General Counsel's motions should not be granted. On April 14, 1975, Respondent filed an opposition to the General Counsel's motions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, including the record of the underlying 10(k) proceeding,[2] the Board makes the following:

Ruling on the Motions to Strike and for Summary Judgment

Review of the record in this proceeding, and the record of the underlying 10(k) proceeding, indicates that a hearing was held pursuant to Section 10(k) of the Act, at which all parties appeared and presented evidence, and were allowed to cross-examine witnesses. On November 12, 1974, the Board issued its Decision and Determination of Dispute, finding *inter alia,* the existence of a jurisdictional dispute involving the

[2] The Board's taking official notice of the record in the 10(k) proceeding, and reliance thereon, is well settled. *Local Union No. 3, International Brotherhood of Electrical Workers, AFL-CIO (Mansfield Contracting Corporation)*, 206 NLRB 423 (1973).

Respondent and the Glaziers, and that there was reasonable cause to believe that the parties had attempted to resolve it by means proscribed by Section 8(b)(4)(D). The Board also found that the results of the proceeding before the Impartial Jurisdictional Disputes Board for the Construction Industry was not controlling, as Respondent had contended.[3] After due consideration of the relevant factors, the Board awarded the disputed work to employees represented by the Glaziers, and determined that Respondent was not entitled by means proscribed by Section 8(b)(4)(D) to force or require the Employer to assign the disputed work to employees represented by it. The Board further ordered Respondent to notify the Regional Director for Region 31, in writing, within 10 days from the date of the award whether or not it would refrain from engaging in the proscribed conduct.

By its denials in its answer to the complaint and by its response to the notice to show cause, Respondent seeks to place in issue, *inter alia,* the Employer's status as an employer as defined in the Act; the Employer's subcontracting to perform the disputed work; its threatening the Employer in support of its demand that employees represented by it be assigned to perform the disputed work; and the existence of a jurisdictional dispute. Respondent also seeks to litigate

[3]The Board found, *inter alia,* that the Employer's contract specifically referred to the National Joint Board, which was not in existence at the time of the pertinent events, and that the Employer had not agreed to be bound by the Impartial Jurisdictional Disputes Board.

issues relating to the National Joint Board for the Settlement of Jurisdictional Disputes (and its successors), arguing, in effect, that a hearing in the instant proceeding is the proper forum in which to do so.

Review of the record in the 10(k) proceeding indicates that these issues were raised and litigated therein. As noted above, Respondent appeared in that proceeding and was provided with a full opportunity to litigate these issues. It offers no evidence herein that was not presented in that proceeding. It is settled that issues raised and litigated in a 10(k) proceeding may not be relitigated in a subsequent unfair labor practice proceeding, alleging violations of Section 8(b)(4)(D) which are based in part on factual determinations made in the 10(k) proceeding.[4] Further, it is established that a hearing *de novo* is not required in the unfair labor practice case on issues litigated in the previous 10(k) proceeding, especially where, as here, Respondent offers nothing not previously considered therein.[5] Accordingly, inasmuch as Respondent is attempting to relitigate issues settled in the underlying 10(k) proceeding, we shall grant the General Counsel's motion to strike the denials in Respondent's answer relating to the above matters.

[4]*Mansfield Contracting Corporation, supra; Bricklayers, Masons and Plasterers International Union of America v. N.L.R.B.,* 475 F. 2d 1316 (C.A.D.C., 1973), enfg. *Bricklayers, Stone Masons, Marble Masons, Tile Setters and Terrazzo Workers, Local Union No. 1 of Tennessee (Shelby Marble & Tile Co.),* 188 NLRB 148 (1971).

[5]*Mansfield Contracting Corporation, supra.*

In the 10(k) proceeding, on the basis of undisputed testimony, we found that Respondent had demanded the disputed work and had threatened to shut down the job in support of this demand, and had by this conduct sought to force or require the assignment of the disputed work to employees represented by it. On this basis, we found reasonable cause to believe that Respondent had violated Section 8(b)(4)(ii)(D) of the Act. This undisputed evidence, which as noted above is neither supplemented nor controverted in this proceeding, likewise establishes, and we find, that Respondent had engaged in the conduct with an object proscribed by Section 8(b)(4)(ii)(D) of the Act, in violation thereof.

Respondent's answer also denies the allegations of having continued to demand the disputed work, and that it failed and refused to timely advise the Regional Director whether or not it intended to comply with the 10(k) award. For the reasons set forth below, we shall grant the General Counsel's motion to strike these denials as well. Initially, with regard to Respondent's continuing to demand the disputed work and its failure to give the Regional Director the requisite timely written notice, the General Counsel attaches as exhibits to his motion certain letters to the Respondent from the Regional Office dated November 18 and December 11, 1974, and January 7, 1975. The first letter is essentially a reminder to Respondent of its duty to provide the required notice, while the other two note that such notice has not been received and basically request that it be forthcoming to forestall further proceedings. Respondent offers nothing to controvert these documents, nor their import, in its response to the notice to show cause. In these circumstances, we find, on the basis of this uncontroverted evidence, that Respondent did in fact fail and refuse to provide the Regional Director with timely written notice of whether or not it would comply with the 10(k) award, as required thereby.[6]

Compliance with a 10(k) award requires a good-faith intent by the particular respondent to accept and abide thereby, including the performance of substantially the same acts as are required for a showing of an intent to comply with a remedial order of the Board.[7] This showing includes, *inter alia,* a timely and unequivocal written statement to the Regional Director indicating such an intent, as is required by the 10(k) award.[8] In the instant case, Respondent has completely failed to notify the Regional Director of its intent to abide, or not abide, by the 10(k) award, a lack of expression which clearly does not manifest the required good-faith intent to abide by the Board's determination. In these circumstances, having found on the basis of undisputed evidence that Respondent had demanded the disputed work, and that it has not expressed a good-faith intent

---

[6]Cf. *Teledyne, Landis Machine,* 212 NLRB 73, fn. 4 (1974).

[7]Cf. *Local 595, International Association of Bridge, Structural and Ornamental Iron Workers, A.F.L., et al. (Bechtel Corporation),* 112 NLRB 812 (1955).

[8]*Bechtel Corporation, supra; Local 568, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO (Dickerson Structural Concrete Corporation),* 204 NLRB 59 (1973).

to abide by the Board's resolution of the dispute in the 10(k) proceeding, we infer that Respondent has not abided thereby and has continued to demand the disputed work.[9]

We have found that Respondent engaged in conduct proscribed by Section 8(b)(4)(D) of the Act, and by not complying with the Board's 10(k) award has continued to engage in such conduct. In view of these findings, and the finding that Respondent is attempting to relitigate issues raised and litigated in the underlying 10(k) proceeding, and that a *de novo* hearing herein is not required, we shall grant the General Counsel's motion to strike the denials in Respondent's answer. There being no issues properly litigable in this proceeding, we shall also grant the General Counsel's motion for summary judgment.

Upon the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE EMPLOYER

Plaza Glass Company is a California corporation engaged in the business of glazing, including the fabricating and installing of glass curtain walls and window walls, with an office and principal place of business located in Woodland Hills, California. In the course and conduct of its business operations annually, Plaza performs services or sells goods valued in excess of $50,000 to customers located within the State

[9] *Ibid.*

of California, who, in turn, annually purchase and receive goods valued in excess of $50,000 directly from sources located outside the State of California.

We find, on the basis of the foregoing, that Plaza Glass Company is, and has been at all times material hereto, an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATIONS INVOLVED

International Association of Bridge, Structural and Ornamental Ironworkers, AFL-CIO, Local 433, and Glaziers, Glassworkers and Glass Warehouse Workers Union, Local No. 636, affiliated with the International Brotherhood of Painters and Allied Trades, AFL-CIO, are now, and have been at all times material hereto, labor organizations within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *Background and Facts of the Dispute*

At all times material hereto, Respondents and the Glaziers have had a jurisdictional dispute concerning the work of fabricating and installing metal doors, metal framing pieces, and glass panes in the construction of window wall units. In and about the months of January, February, and March 1974, in furtherance of this dispute, Respondent warned and threatened the Employer, *inter alia,* that it would shut down the job unless employees who are members of or

represented by it were assigned to perform the disputed work. In so doing, Respondent has threatened, coerced, and restrained the Employer, with an object of forcing or requiring it to assign the disputed work to employee-members of or represented by it, rather than to employee-members of or represented by the Glaziers.

B. *The Determination of Dispute*

On November 12, 1974, the Board issued a Decision and Determination of Dispute (214 NLRB No. 140) finding that employees represented by the Glaziers are entitled to perform the disputed work, and that Respondent was not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force or require the Employer to assign the work to employees represented by it.

C. *Respondent's Refusal To Comply*

By failing and refusing to notify the Regional Director for Region 31, in writing, of its intent to comply with the above-mentioned Decision and Determination of Dispute, Respondent has not complied with the award and has continued to demand the disputed work.

IV. THE EFFECTS OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent, as set forth in section III, above, occurring in connection with the operations of the Employer, set forth in section I, above,

have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices affecting commerce within the meaning of Section 8(b)(4)(ii)(D) of the Act, we shall order that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Upon the basis of the foregoing facts and the entire record, the Board makes the following:

CONCLUSIONS OF LAW

1. Plaza Glass Company is an employer engaged in commerce or an industry affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. Respondent International Association of Bridge, Structural and Ornamental Ironworkers, AFL-CIO, Local 433, and Glaziers, Glassworkers and Glass Warehouse Workers Union, Local No. 636, affiliated with the International Brotherhood of Painters and Allied Trades, AFL-CIO, are labor organizations within the meaning of Section 2(5) of the Act.

3. Respondent has violated and is violating Section 8(b)(4)(ii)(D) of the Act by failing and refusing to comply with the Board's Decision and Determination of Dispute and by continuing to de-

mand the disputed work, thereby threatening, coercing, and restraining the Employer, with an object of forcing or requiring the Employer to assign the disputed work to employees represented by it.

4. The aforementioned unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, International Association of Bridge, Structural and Ornamental Ironworkers, AFL-CIO, Local 433, Los Angeles, California, its officers, agents, and representatives, shall:

1. Cease and desist from refusing to comply with the Board's Decision and Determination of Dispute and from threatening, coercing, or restraining Plaza Glass Company, where an object thereof is to force or require Plaza Glass Company to assign the work of fabricating and installing metal doors, metal framing pieces, and glass panes in the construction of window wall units to employees represented by it rather than to employees represented by Glaziers, Glassworkers and Glass Warehouse Workers Union, Local No. 636, affiliated with the International Brotherhood of Painters and Allied Trades, AFL-CIO.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Post at its business offices and meeting halls copies of the attached notice marked "Appendix."[10] Copies of said notice, on forms provided by the Regional Director for Region 31, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(b) Furnish the Regional Director for Region 31 with signed copies of such notice for posting by the Employer, if willing, in places where notices to employees are customarily posted.

(c) Notify the Regional Director for Region 31, in writing, within 20 days from the date of this Order, what steps Respondent has been taken to comply herewith.

APPENDIX (Omitted)

---

[10]In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Appendix C

Glaziers, Glassworkers and Glass Warehouse Workers Union, Local No. 636, Affiliated with the International Brotherhood of Painters and Allied Trades, AFL-CIO and Plaza Glass Company and International Association of Bridge, Structural and Ornamental Ironworkers, AFL-CIO, Local 433. Cases 31—CD—127 and 31—CD—129

November 12, 1974

DECISION AND DETERMINATION OF DISPUTE

BY MEMBERS JENKINS, KENNEDY, AND PENELLO

This is a proceeding under Section 10(k) of the National Labor Relations Act, as amended, following separate charges filed by Plaza Glass Company, herein called Employer, alleging that Glaziers, Glassworkers and Glass Warehouse Workers Union, Local No. 636, affiliated with the International Brotherhood of Painters and Allied Trades, AFL-CIO, herein called Glaziers, and International Association of Bridge, Structural and Ornamental Ironworkers, AFL-CIO, Local 433, herein called Ironworkers, respectively, violated Section 8(b)(4)(D) of the Act by engaging in certain proscribed activity with an object of forcing or requiring the Employer to assign certain work to employees represented by their respective organizations.

Pursuant to notice, hearing was held before Hearing Officer Norman L. McCracken on May 20 and 21, 1974, and before Hearing Officer Raymond M. Norton on June 14, 1974. All parties, including the

Employer, Glaziers, Ironworkers, and the Southern California Glass Management Association[1] appeared at the hearing and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to adduce evidence bearing on the issues.[2] Thereafter, the Employer, Glaziers, and Ironworkers filed briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the rulings of the Hearing Officers made at the hearing and finds that they are free from prejudicial error. They are hereby affirmed.

Upon the entire record in this case, the Board makes the following findings:

I. THE BUSINESS OF THE EMPLOYER

We find that the Employer is a California corporation engaged in the business of glazing, including the fabricating and installing of glass curtain walls and window walls. The parties stipulated, and we find, that the Employer has performed services or sold

[1] At the hearing, the Southern California Glass Management Association was permitted to intervene as a party in interest. This association is comprised of some 82 employers, including Plaza Glass Company, engaged in the glass and glazing industry in the Southern California area.

[2] Although Ironworkers was afforded the opportunity at the hearing to present witnesses on its behalf, it declined to do so.

goods valued in excess of $50,000 annually to customers which themselves meet the Board's discretionary direct-inflow jurisdictional Standard. Accordingly, we find that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that it will effectuate the purposes of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATIONS INVOLVED

The parties stipulated, and we find, that Glaziers and Ironworkers are labor organizations within the meaning of Section 2(5) of the Act.

III. THE DISPUTE

A. *Background and Facts*

The following facts are undisputed. On March 19, 1973, Howard S. Wright Construction Co., a general contractor, engaged the Employer as a subcontractor to furnish and install aluminum doors, frames, windows, and window wall units, and to perform other glazing work on the Ocean View Apartment project in Marina del Rey, California. At all times since the Employer commenced working on that project it has utilized its own employees represented by Glaziers to perform such work.

During January 1974, Frank P. Ragusa, president and one of the owners of the Employer, received a telephone call from one Kinney, a representative of Ironworkers. At that time Kinney stated that the Employer was using glaziers to perform work which be-

longed to ironworkers and requested that Ragusa meet with him to discuss the matter.[3] Later that month, during a meeting arranged between the two, Kinney reiterated Ironworkers' claim to the work on the Ocean View project and stated that he would do "everything in his power" to stop glaziers from performing the work. Kinney further warned Ragusa that if the Employer did not place ironworkers on the job immediately, he would cause "one hell of a problem" with the general contractor and would shut down the job.

Following this meeting, Ragusa telephoned Helton, a representative of Glaziers, and related the contents of his conversation with Kinney. Helton then informed Ragusa that the Employer was bound by its agreement with Glaziers and that if it should employ ironworkers to perform the work on the Ocean View project, Glaziers would consider the Employer to have violated that agreement. Thereafter, by letter dated February 12, 1974, Glaziers notified the Employer that in the event it did not assign to glaziers the window wall work on the Ocean View project, as

[3] According to the uncontroverted testimony of Ragusa, Kinney had spoken with him in November 1973 while the Employer was engaged in similar work on another project. At that time Kinney claimed such work for ironworkers and stated that, although the Employer would be permitted to complete that project, it would not be allowed to perform such work in the future within Orange County, California, unless it employed ironworkers for such work.

well as similar work on other projects to be commenced in the future, Glaziers would take action "including withdrawing Glaziers from your job sites, refusing to dispatch Glaziers and picketing all job sites where your Company is performing work. . . ."

Subsequently, on March 15, Ragusa was approached by Kinney at the Ocean View project. At that time, Kinney told Ragusa that the Jurisdictional Disputes Board had awarded the work at that project to ironworkers and demanded to know why the Employer had not complied with the award. When Ragusa advised Kinney to contact Glaziers, Kinney again stated that he would go to the general contractor and shut down the job. Shortly thereafter, Ragusa received a telephone call from one Lansford, another representative of Ironworkers, who suggested that they meet to discuss the matter. Ragusa agreed to do so and, on March 18, he met with Lansford and Kinney. During this meeting Ragusa rejected Ironworkers' request to employ its members on the Ocean View project, whereupon Lansford threatened to shut down the job. Kinney then stated that the Ironworkers is "big" and "powerful" and "we can get anything we want," and then added, "You're Italian, you know how the Mafia works? . . . They [Ironworkers] could get rough and tough. . . ."

B. *The Work in Dispute*

The work in dispute consists of the fabricating and installing of metal doors, metal framing pieces, and glass panes in the construction of window wall units.

C. *Contentions of the Parties*

Ironworkers solely contends that this proceeding is not properly before the Board because an agreed-upon method for the voluntary settlement of the dispute exists to which all parties are bound. In support of this contention Ironworkers argues that all parties herein are bound to the procedures of the Impartial Jurisdictional Disputes Board for the Construction Industry, herein called the Impartial Jurisdictional Disputes Board, and, therefore, to a decision of that body awarding the work in dispute to ironworkers.

The Employer contends that its assignment of the disputed work is consistent with its collective-bargaining agreement with Glaziers and its past practice and area practice, and that the factors of relative skills, safety, efficiency and economy of operations favor an award of the disputed work to employees represented by Glaziers. The Employer further contends that no agreed-upon method for the voluntary settlement of the instant dispute exists to which all parties are bound.

Glaziers, for reasons similar to those urged by the Employer, contends that the work in dispute should be awarded to employees represented by it. Glaziers further contends that any award herein should not be limited to the Ocean View project, but rather should encompass all similar work performed by all glass installing contractors in the southern California area.

D. *Applicability of the Statute*

Before the Board may proceed with a determination of dispute pursuant to § 10(k) of the Act, it must be satisfied that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated, and that there is no agreed-upon method for the voluntary settlement of the dispute.

As stated above, it is undisputed that Ironworkers demanded the disputed work and, on various occasions, threatened to shut down the Ocean View project in support of its demand. It is further undisputed that Glaziers claimed the work involved herein, as well as such worked to be performed by the Employer in the future, and advised the Employer that if the latter failed to assign such work to employees represented by it, it would withdraw its members, refuse to dispatch its members, and picket the Employer's jobsites. Based on the foregoing and the record as a whole, we find that both Ironworkers and Glaziers sought to force or require the assignment of the disputed work to employees represented by their respective organizations. Accordingly, we find reasonable cause exists to believe that Ironworkers and Glaziers, respectively, violated Section 8(b)(4)(D) of the Act.

As noted above, Ironworkers contends that all parties herein are bound to the procedures of the Impartial Jurisdictional Disputes Board and to the decision rendered by that body awarding the work involved herein to ironworkers. With respect to the Employer, Ironworkers primarily contends that it is expressly

bound to the procedures of the Impartial Jurisdictional Disputes Board by virtue of its subcontracting agreement with the general contractor on the Ocean View project, executed on March 19, 1973, and which provides in pertinent part: "Subcontractors are bound by [sic] agreement establishing [sic] National Joint Board and its procedural rules in assignment of work. . . ." Alternatively, Ironworkers contends the Employer has in fact submitted the instant dispute to that body inasmuch as it was fully aware of, but did not protest, the proceedings before that body, and it supplied evidence to Glaziers for use in those proceedings. We find these contentions without merit.

By its terms the above-quoted clause of the contract between the Employer and the general contractor on the Ocean View project specifically refers to the National Joint Board, a body which was in existence at the time of the execution of the contract, but which had expired at the time of the events herein. Applying the rationale set forth in *Lembke,*[4] we hold that the Employer's obligation to be bound to the National Joint Board ceased with the termination of that body. Furthermore, in view of the fact that the Impartial Jurisdictional Disputes Board did not come into existence until June 1, 1973, and in view of the absence of any evidence showing that the Employer has stipulated to be bound to the procedures of that body, we conclude that it has not expressly consented to be

---

[4] *Bricklayers, Masons and Plasterers' International Union of America, Local No. 1, AFL-CIO (Lembke Construction Company of Colorado, Inc.),* 194 NLRB 649, 650-651 (1971).

bound thereby.[5] Finally, we reject Ironworkers' contention that the Employer, by its conduct, signified an intention to be bound by the proceedings before the Impartial Jurisdictional Disputes Board. In this regard, we particularly note that the Employer neither was present nor was represented during those proceedings; that it did not directly correspond with that body; and that it did not inform any one that it would consider itself bound by any decision rendered by that body.[6]

It is clear from the foregoing, and we find, that at the time of the instant dispute there did not exist any agreed-upon or approved method for the voluntary adjustment of the dispute to which all parties to the dispute were bound.[7] Accordingly, the matter is properly before the Board for determination.

---

[5]The Impartial Jurisdictional Disputes Board is a creature of the Plan for Settlement of Jurisdictional Disputes in the Construction Industry which became effective on June 1, 1973. That plan provides that an employer may bind itself to the plan by signing a stipulation that it is willing to be bound, or by membership in an association of employers which has the authority to bind its members and which has signed a stipulation to be bound, or by being a party to a collective-bargaining agreement which provides for the settlement of disputes under the plan. The record clearly discloses that the Employer has not committed itself to the procedures of the plan through any of these means.

[6]Cf. *Sheet Metal Workers International Association, Local 19 (Modern Cooling, Inc.)*, 199 NLRB 1020 (1972); *International Association of Bridge, Structural & Ornamental Iron Workers, Local 272 (P & G Erectors, Inc.)*, 203 NLRB 1021 (1973).

[7]At the hearing, Respondent filed a "Motion to Dismiss" the 10(k) proceeding on the ground that all parties are bound to the award rendered by the Impartial Jurisdictional Disputes Board. The Hearing Officer reserved ruling on this motion to the Board. In view of our decision herein, we hereby deny Respondent's motion.

E. *Merits of the Dispute*

Section 10(k) of the Act requires the Board to make an affirmative award of the disputed work after giving due consideration to various relevant factors.

1. Certification and collective-bargaining agreements

Neither of the labor organizations herein involved has been certified as the collective-bargaining representative for a unit of the Employer's employees. The Employer has no collective-bargaining agreement with Ironworkers. The Employer, however, has a current collective-bargaining agreement with Glaziers which specifically covers the work in dispute. The Employer's collective-bargaining agreement with Glaziers, therefore, favors the Employer's assignment of the work to its employees represented by Glaziers.

2. Employer's assignment and practice

It is undisputed that since it began operations in 1965, the Employer, with the exception of one project, has consistently assigned the work in dispute to its employees represented by Glaziers. The Employer's past practice, therefore, favors the Employer's assignment.

3. Area and industry practice

The Employer presented testimony that it is the general practice among glazing contractors performing window wall work in the Southern California area to utilize glaziers for all phases of such construc-

tion. Glaziers presented testimony that during the last 5 years employees represented by it have installed approximately 85 to 90 percent of the metal units in window wall construction in this area.

Ironworkers has submitted into evidence a copy of the decision rendered by the Impartial Jurisdictional Disputes Board which awards the disputed work to ironworkers based on trade practice. Although we do not consider that award binding on the Employer, we do consider it as a factor in determining the proper assignment of the work in dispute. However, in view of all the circumstances, we are of the opinion that the award of the Impartial Jurisdictional Disputes Board should not be accorded controlling weight. We find, therefore, that the evidence relating to area and industry practice is inconclusive.

4. Relative skills, safety, efficiency, and economy of operations

The record shows that the fabrication and installation of metal framing pieces for window wall units require working at close tolerances to ensure that window panes are firmly and properly installed. Furthermore, the handling and cutting of glass require the exercise of great caution and, if done improperly, may cause serious injury to workmen. Additionally, the improper installation of window wall units creates a real risk that the glass panes may break and fall to the ground from great heights thereby causing serious personal injury and property damage. It is undisputed that glaziers possess the necessary skills

and experience to perform such work in a satisfactory and safe manner. It is further undisputed that ironworkers are unaccustomed to working at such precise tolerances and that they have no experience in glazing work. The factors of relative skills and safety, therefore, favor the Employer's assignment.

The Employer urges that factors of efficiency and economy of operations support its assignment. Thus, the Employer presented undisputed testimony that glaziers perform the work involved herein in a rapid and efficient manner, thereby avoiding delays in construction which may result in the incurring of costly penalties by the Employer. Furthermore, the Employer presented testimony that the utilization of glaziers offers greater flexibility and versatility in the performance of such work. In this regard, the Employer adduced testimony that during those frequent periods when metal is unavailable, glaziers may be used to install glass panes, whereas ironworkers, who do not possess this additional skill, would have to stand idle. Since Ironworkers adduced no evidence to establish that it would be at least as economical to utilize employees represented by it, we find that the factors of efficiency and economy of operations favor the Employer's assignment.

Conclusion

Upon the record as a whole, and after full consideration of all relevant factors involved, we conclude that the Employer's employees represented by Glaziers are entitled to perform the work in dispute. We

reach this conclusion upon the facts that the assignment is consistent with the Employer's past practice and its current collective-bargaining agreement with Glaziers; it is not clearly inconsistent with area practice; the employees represented by Glaziers possess the requisite skills and safety considerations to perform the work; such assignment will result in greater efficiency and economy of operations; and it is consistent with the Employer's preference. Accordingly, we shall determine the dispute before us by awarding the work in dispute to the Employer's employees represented by Glaziers, but not to that Union or its members. In consequence, we also find that Ironworkers is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force or require the Employer to assign the disputed work to employees represented by it.

The Board has previously held that it will restrict the scope of its determination to a specific jobsite unless there is evidence that similar disputes may occur in the future.[8] In view of the undisputed testimony of the Employer's president that Ironworkers has stated its intention to prevent the Employer from utilizing glaziers to perform such work anywhere within Orange County, California, and that the Employer, as of the time of the hearing, had future commitments to perform such work in that area, we

[8]See, e.g., *International Longshoremen's Association, Local 1576, AFL-CIO and International Longshoremen's Association, Local 329, AFL-CIO (Texas Contracting Company)*, 162 NLRB 878, 884 (1967).

believe that there is a reasonable likelihood that this dispute will recur. Therefore, our determination in this case applied not only to the jobsite where the dispute arose, but to all similar work done or to be done by the Employer within the Orange County, California, area.

DETERMINATION OF DISPUTE

Pursuant to Section 10(k) of the National Labor Relations Act, as amended, and upon the basis of the foregoing findings and the entire record in this proceeding, the National Labor Relations Board makes the following Determination of Dispute:

1. Employees of Plaza Glass Company who are currently represented by Glaziers, Glassworkers and Glass Warehouse Workers Union, Local No. 636, affiliated with the International Brotherhood of Painters and Allied Trades, AFL-CIO, are entitled to perform the work of fabricating and installing metal framing pieces and glass panes in the construction of window wall units on the Ocean View Apartment project at Marina del Rey, California, and on any other of the Employer's projects in the Orange County, California, area.

2. International Association of Bridge, Structural and Ornamental Ironworkers, AFL-CIO, Local 433, is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force or require Plaza Glass Company to assign the above work to employees represented by it.

3. Within 10 days from the date of this Decision and Determination of Dispute, International Association of Bridge, Structural and Ornamental Ironworkers, AFL-CIO, Local 433, shall notify the Regional Director for Region 31, in writing, whether or not it will refrain from forcing or requiring the Employer, by means proscribed by Section 8(b)(4)(D) of the Act, to assign the work in dispute to employees represented by Ironworkers rather than to employees represented by Glaziers.

No. 76-1770

In the Supreme Court of the United States

OCTOBER TERM, 1977

INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS, AFL-CIO, LOCAL 433, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

JOHN S. IRVING,
General Counsel,

JOHN E. HIGGINS, JR.,
Deputy General Counsel,

CARL L. TAYLOR,
Associate General Counsel,

NORTON J. COME,
Deputy Associate General Counsel,

CHARLES P. DONNELLY,
Attorney,
National Labor Relations Board,
Washington, D.C. 20570.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1770

INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS, AFL-CIO, LOCAL 433, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-14) is reported at 549 F. 2d 634. The decision and order of the National Labor Relations Board (Pet. App. 15-27) are reported at 218 NLRB 848. The Board's earlier decision and determination of dispute in a proceeding under Section 10(k) of the National Labor Relations Act (Pet. App. 28-42) are reported at 214 NLRB 912.

JURISDICTION

The judgment of the court of appeals was entered on March 14, 1977 (Pet. 2). The petition for a writ of certio-

rari was filed on June 11, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board properly refused to permit relitigation in the unfair labor practice proceeding of an issue which had previously been litigated and decided in a proceeding to resolve the underlying jurisdictional dispute, when the relevant evidence of record was not challenged and no new evidence was tendered.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are set forth in the petition at pp. 2-4.

STATEMENT

In 1973, Plaza Glass Company ("the Company") contracted to fabricate and install windows and doors for an apartment construction project in Southern California. Pursuant to its collective bargaining agreement with the Glaziers, Glassworkers and Glass Warehouse Workers Union, Local 636 ("the Glaziers"), the Company intended to employ persons represented by the Glaziers to perform the work (Pet. App. 2). However, in January 1974, a representative of petitioner Union ("the Ironworkers") demanded that the Company assign the work to its members, rather than to the Glaziers. On several occasions representatives of the Ironworkers threatened to slow down or stop the project unless its members were hired. The Glaziers took the position that reassignment of the work would violate the contract it had with the Company and would be grounds for picketing the job site. (*Ibid.*)

Upon charges filed by the Company against both unions alleging a violation of Section 8(b)(4)(D) of the National Labor Relations Act, 29 U.S.C. 158(b)(4)(D),[1] the Board's Regional Director ordered a hearing to resolve the underlying jurisdictional dispute, pursuant to Section 10(k) of the Act, 29 U.S.C. 160(k).[2] At this hearing, all parties appeared and presented evidence, and were allowed to cross-examine witnesses (Pet. App. 17). The Ironworkers claimed that the Board lacked jurisdiction to hear and determine the dispute because the parties, including the Company, had agreed upon a voluntary method for resolving the dispute (Pet. App.

---

[1]Section 8(b)(4)(D), 29 U.S.C. 158(b)(4)(D), in relevant part, makes it an unfair labor practice for a labor organization or its agents "to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where * * * an object thereof is—

> (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work: * * *."

[2]Section 10(k), 29 U.S.C. 160(k), provides:

> Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 158(b) of this title, the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

2-3). After reviewing the evidence in support of the Ironworkers' contention—namely, a clause in the Company's performance contract binding it to submit disputes to a private tribunal—the Board found that this tribunal was defunct as of the time at issue and the Company had not agreed to be bound by decisions of the successor tribunal. The Board accordingly concluded that there did not exist any voluntary method of adjustment to which the parties were bound (Pet. App. 34-36). After determining that there was reasonable cause to believe that the Ironworkers had engaged in conduct proscribed by Section 8(b)(4)(D), 29 U.S.C. 158(b)(4)(D) (Pet. App. 34), the Board proceeded to determine the dispute on the merits. It concluded, after consideration of the relevant factors, that the Glaziers were entitled to perform the work in dispute (Pet. App. 37-40).

When the Ironworkers refused to comply with the Section 10(k) award, the General Counsel of the Board issued a complaint alleging that the Union had violated Section 8(b)(4)(D) of the Act, 29 U.S.C. 158(b)(4)(D). The Board found that the Ironworkers' answer merely placed in issue the same matters which had been raised and litigated in the Section 10(k) proceeding, and that the Union offered no evidence that had not been presented in that proceeding (Pet. App. 19). The Board further found, based upon the undisputed evidence in the entire record, that the Ironworkers had engaged in conduct proscribed by Section 8(b)(4)(D) of the Act, 29 U.S.C. 158(b)(4)(D) (Pet. App. 20). Accordingly, the Board granted the General Counsel's motion for summary judgment and ordered the Ironworkers to cease and desist from unlawfully threatening work stoppages in support of its jurisdictional demands. (Pet. App. 15-27.)

The court of appeals enforced the Board's order (Pet. App. 1-14).

ARGUMENT

Petitioner's sole contention (Pet. 7) is that it should have been permitted to relitigate, in the Section 8(b)(4)(D) unfair labor practice proceeding, the issue whether there was an agreed-upon method for resolving the jurisdictional dispute among the parties, although this issue had previously been litigated and decided in the proceeding pursuant to Section 10(k) of the Act, 29 U.S.C. 160(k). The court below properly rejected this contention, and its holding is in accord with that of other courts of appeals that have had occasion to consider the question. See *Bricklayers, Masons & Plasterers Intl. Union of America* v. *National Labor Relations Board*, 475 F. 2d 1316, 1322 (C.A. D.C.); *National Labor Relations Board* v. *International Longshoremen's Ass'n, Local 1576*, 409 F. 2d 709, 710 (C.A. 5). Thus, no issue warranting review by this Court is presented.

When a charge is filed under Section 8(b)(4)(D) of the Act, 29 U.S.C. 158(b)(4)(D), the provision dealing with jurisdictional disputes, the Board must, under Section 10(k) of the Act, 29 U.S.C. 160(k), "hear and determine the dispute out of which [the] unfair labor practice shall have arisen, unless * * * the parties to such dispute" adjust or agree upon a method for the voluntary adjustment of the dispute. The purpose of Section 10(k), 29 U.S.C. 160(k), is to "induce unions to settle their differences without awaiting unfair labor practice proceedings and enforcement of Board orders by courts of appeals." *International Telephone & Telegraph Corp.* v. *Local 134, International Brotherhood of Electrical Workers*, 419 U.S. 428, 431. If a union does

not abide by a determination made by the Board pursuant to Section 10(k), 29 U.S.C. 160(k), a complaint may then issue upon a Section 8(b)(4)(D) unfair labor practice charge.

This Court has recognized that Section 8(b)(4)(D) and Section 10(k) proceedings are separate, that the "findings and conclusions in a § 10(k) proceeding are not *res judicata* on the unfair labor practice issue in the later § 8(b)(4)(D) determination," and that "[b]oth parties may put in new evidence at the § 8(b)(4)(D) stage." *International Telephone & Telegraph Corp., supra*, 419 U.S. at 446-447, quoting from *National Labor Relations Board* v. *Plasterers' Local Union No. 79*, 404 U.S. 116, 122 n. 10. However, the Court has also recognized that the "same issues will generally be relevant, the record of the earlier proceeding will be admitted in the later one, 29 C.F.R. § 102.92, and the Board's ruling on the merits of those issues which are common to the two proceedings is likely to be the same in the one as in the other." *International Telephone & Telegraph Corp., supra*, 419 U.S. at 447.

The procedure followed by the Board in this case comported with these principles. Petitioner was accorded a full opportunity to, and did, litigate in the Section 10(k) proceeding the question whether a voluntary method of adjusting the dispute existed. The Board, after reviewing the record in that proceeding, concluded that there was no such mechanism. The record of the Section 10(k) proceeding was introduced in the subsequent Section 8(b)(4)(D) proceeding. Petitioner did not offer any new evidence on this question, but simply asserted that it had a right to a *de novo* determination of the question in the Section 8(b)(4)(D) proceeding. In these circumstances, the Board could properly bar relitigation of the question whether a voluntary method of adjustment existed.

Petitioner contends that the Board gave *res judicata* effect to the prior proceeding, in contravention of the procedures approved in *International Telephone*, and thereby failed to apply the proper statutory standard in determining whether an unfair labor practice had occurred (Pet. 10). The Board, however, indicated a willingness to accept new evidence, if any existed (Pet. App. 20). Further, the Board made its determination of unfair labor practices on the whole record before it and in so doing, as the court of appeals held (Pet. App. 8), applied the "preponderence of the evidence" standard required to support a violation of Section 8(b)(4)(D) of the Act, 29 U.S.C. 158(b)(4)(D).

Indeed, the propriety of the Board's procedures seems to be all but settled by this Court's decisions regarding the closely analogous Board proceedings relating to unfair labor practice allegations arising out of representation disputes, pursuant to Section 9 of the Act, 29 U.S.C. 159. If there is a dispute as to the proper bargaining unit, the Board follows procedures similar to those in Section 10(k) hearings to determine the bargaining unit. Compare 29 C.F.R. 102.60 *et seq.* with 29 C.F.R. 102.89 *et seq.* These procedures, like those under Section 10(k), do not conform with Section 554 of the Administrative Procedure Act, 5 U.S.C. 554, in several respects.[3] Yet this Court has held that once the repre-

---

[3]For example, under neither procedure do hearing officers prepare findings of fact and conclusions of law. 29 C.F.R. 102.66(f), 102.90. See 5 U.S.C. 557.

sentation issue is fully litigated in the representation proceeding under Section 9 of the Act, 29 U.S.C. 159, the Board need not allow the issue to be relitigated in a related unfair labor practice proceeding determining whether the employer has unlawfully refused to bargain with the union certified in the representation proceeding, unless new evidence is offered by the parties. *Pittsburgh Glass Co.* v. *National Labor Relations Board*, 313 U.S. 146, 162; *Magnesium Casting Co.* v. *National Labor Relations Board*, 401 U.S. 137, 141. As this Court stated: "If the Company or the * * * Union desired to relitigate this issue, it was up to them to indicate in some way that the evidence they wished to offer was more than cumulative [of that given in the earlier proceeding]. Nothing more appearing, a single trial of the issue was enough." *Pittsburgh Glass Co.* v. *National Labor Relations Board, supra*, 313 U.S. at 162.

Similarly, in this case, "a single trial of the issue" of the existence of a voluntary method of adjustment was enough.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

JOHN S. IRVING,
General Counsel,

JOHN E. HIGGINS, JR.,
Deputy General Counsel,

CARL L. TAYLOR,
Associate General Counsel,

NORTON J. COME,
Deputy Associate General Counsel,

CHARLES P. DONNELLY,
Attorney,
National Labor Relations Board.

AUGUST 1977.

DOJ-1977-08